

Message Text

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ACTION EB-08

INFO OCT-01 EUR-12 IO-13 ISO-00 AGRE-00 CIAE-00

COME-00 INR-07 LAB-04 NSAE-00 SP-02 STR-04

TRSE-00 FRB-03 OMB-01 /055 W

-----212052Z 026566 /43

R 211655Z MAR 77

FM USMISSION GENEVA

TO SECSTATE WASHDC 6089

INFO AMEMBASSY OTTAWA

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E.O. 11652: N/A

TAGS: GATT, ETRD, CA

SUBJ: U.S. ARTICLE XIX CONSULTATIONS WITH CANADA ON

TEXTILES

REF: STATE 60036

FOLLOWING ARE MISSION COMMENTS ON GATT LEGAL QUESTIONS REQUESTED IN FINAL PARA OF REFTTEL:

1. THERE ARE NO GATT RULES OUTLINING PROCEDURES FOR NEGOTIATIONS UNDER ARTICLE XIX. THE NORMAL GATT PRACTICE IS THAT THE STANDARDS APPLIED FOR ARTICLE XXVIII SHOULD APPLY IN SUCH CASES. IT SHOULD BE CAUTIONED, HOWEVER, THAT IN SOME ARTICLES IT IS ACTUALLY SPECIFIED THAT THE PROVISIONS OF ARTICLE XXVIII SHOULD APPLY (AS, FOR EXAMPLE, IN THE CASE OF ARTICLE XXIV:6). THUS, AN ARGUMENT CAN BE MADE THAT THE PRINCIPLES OF ARTICLE XXVIII, IF THEY HAD BEEN INTENDED TO APPLY, WOULD HAVE BEEN SPECIFIED. STILL, WE AND GATT SECRETARIAT FEEL THAT ARTICLE XXVIII PRACTICE IS PERTINENT TO ARTICLE XIX.

2. ARTICLE XIX:3(A) REFERS TO "AFFECTED CP'S" BEING

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FREE TO SUSPEND CONCESSIONS, AND THIS COULD GIVE A RISE TO INTERPRETATION THAT "SUBSTANTIAL INTEREST" REFERRED TO IN XIX:2 IS NOT THE STANDARD INTENDED. HOWEVER, THE PROGRESSIVE FLOW FROM XIX:2 TO XIX:3 SEEMS TO MAKE IT IMPLICIT THAT "SUBSTANTIAL INTEREST" IS INDEED THE STANDARD MEANT. THIS IS THE RULE FOLLOWED IN ARTICLE XXVIII CASES.

3. "SUBSTANTIAL INTEREST" HAS NEVER FORMALLY COME UP FOR GATT DECISION IN THE ARTICLE XIX CONTEXT. IT HAS BEEN BROACHED BILATERALLY BUT NEVER OFFICIALLY. GATT SECRETARIAT GENERALLY ADVISES GENEVA DELS ON INFORMAL BASIS ALONG SAME LINES IN ARTICLE XIX CASES AS THEY DO IN ARTICLE XXVIII CASES: THAT APPROXIMATELY 10 PERCENT MARKET SHARE IS A USEFUL STANDARD. EC, FOR EXAMPLE, USED 10 PERCENT IN RECENT ARTICLE XXIV:6 NEGOTIATIONS BUT DID NOT QUIBBLE IF A SUPPLIER FELL A LITTLE SHY. "PLUS OR MINUS 10 PERCENT" SEEMS THE GATT STANDARD.

4. VALUE AND NOT VOLUME IS THE CUSTOMARY GATT MEASURE WHEN DISCUSSING MARKET SHARE, AND THIS VIEW IS CORROBORATED BY THE GATT SECRETARIAT. IN THE CURRENT CANADIAN CASE, THIS IS WEAKENING SOMEWHAT BY THE FACT THAT TEXTILES TRADE TENDS (ALTHOUGH NOT UNIVERSALLY) TO USE VOLUME REPEAT VOLUME AND NOT VALUE IN THE GATT CONTEXT. IF CANADIANS SHOULD INVOKE THE LATTER STANDARD, I.E., THAT VOLUME IS THE CUSTOMARY GATT MEASUREMENT FOR TEXTILES, WE MIGHT RESPOND BY REMINDING THEM OF CLAIM THAT THEIR ACTION IS TAKEN OUTSIDE CONTEXT OF GATT TEXTILES AGREEMENT.

5. ARTICLE XIX MAKES NO MENTION OF DAMAGE OR INJURY TO THE EXPORTER'S TRADE, AND WE DO NOT BELIEVE U.S. SHOULD ACQUIESCE TO CANADIAN ASSERTION THAT THERE IS GATT LEGAL REQUIREMENT TO SHOW INJURY TO THE EXPORTER IN ARTICLE XIX:3 CONTEXT. AFFECTED PARTIES CAN SUSPEND ANY SUBSTANTIAL OFFICIAL USE

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TIALLY EQUIVALENT CONCESSIONS OR OTHER OBLIGATIONS OF WHICH CP'S DO NOT DISAPPROVE.

6. GATT SECRETARIAT (LINDEN) SEE "INJURY " TO EXPORTER INTEREST AS A CONCEPT THAT IS EVEN MORE NEBULOUS AND UNTRIED IN GATT CONTEXT THAN "SUBSTANTIAL SUPPLIER". HOWEVER, LINDEN BELIEVES EXISTENCE OF INJURY TO SUPPLIERS WOULD BE PRESUMED UPON INVOCATION OF ARTICLE XIX. WE AGREE, EXCEPT THAT FOR PRESERVATION OF LONGSTANDING U.S. POSITION IN U.S.-CANADA ARTICLE XIX DISPUTES, WE OUGHT NOT TO ACKNOWLEDGE THIS TO CANADIANS. MOREOVER, THE EXTENT OF ANY U.S. WITHDRAWALS WOULD HAVE TO BE DEFENSIBLE IN CONTEXT OF XIX:3(A) LANGUAGE: "THE SUSPENSION OF WHICH THE CP'S DO NOT DISAPPROVE". THUS, AS A PRACTICAL (AND NOT LEGAL) MATTER, WE WOULD ULTIMATELY HAVE TO BE IN A POSITION TO DEMONSTRATE TRADE IMPAIRMENT EQUIVALENT TO THE MAGNITUDE OF ANY WITHDRAWALS.SORENSEN

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01-Jan-1994 12:00:00 am
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: TEXTILES, CONSULTANTS, NEGOTIATIONS
Control Number: n/a
Copy: SINGLE
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Decaption Date: 01-Jan-1960 12:00:00 am
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 22 May 2009
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1977GENEVA02124
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Expiration:
Film Number: D770096-0964
Format: TEL
From: GENEVA
Handling Restrictions: n/a
Image Path:
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Legacy Key: link1977/newtext/t19770340/aaaabikp.tel
Line Count: 114
Litigation Code IDs:
Litigation Codes:
Litigation History:
Locator: TEXT ON-LINE, ON MICROFILM
Message ID: 837f5cb5-c288-dd11-92da-001cc4696bcc
Office: ACTION EB
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 3
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 77 STATE 60036
Retention: 0
Review Action: RELEASED, APPROVED
Review Content Flags:
Review Date: 21-Dec-2004 12:00:00 am
Review Event:
Review Exemptions: n/a
Review Media Identifier:
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
SAS ID: 3051729
Secure: OPEN
Status: NATIVE
Subject: U.S. ARTICLE XIX CONSULTATIONS WITH CANADA ON TEXTILES
TAGS: ETRD, CA, US, GATT
To: STATE
Type: TE
vdkgvwkey: odbc://SAS/SAS.dbo.SAS_Docs/837f5cb5-c288-dd11-92da-001cc4696bcc
Review Markings:
Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
22 May 2009
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 22 May 2009